89-97

No.

Supreme Court, U.S.
FILED
JUL 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RAYMOND MIRRER,

Petitioner,

— vs. —

KEVIN T. SMYLEY,
Commissioner of Probation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RAYMOND MIRRER
Petitioner, Pro Se
320 East 46th Street
New York, New York 10017
(212) 661-5770

QUESTIONS PRESENTED

1. Was the Circuit Court obliged to grant habeas relief upon a showing of fundamental unfairness in a successive petition as to new claims which showed "tainted" proceedings in the conduct of the Grand Jury and/or trial proceedings, involving violation of constitutional rights, whereas, prior findings as to a first petition were based upon other matters deemed to be mere "harmless error"?

2. Was it error for the District Court Judge, who conceded that new claims in a successive petition were "not identical", to have intertwined old claims with new claims, and to have relied solely upon the decision of a prior Circuit panel

as to a determination of a lack of fundamental unfairness, based upon old claims of limited scope which were not of the constitutional magnitude of the new claims?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
Constitutional Provisions Involved	
Order Being Appealed	1
Jurisdiction	2
Statement of the Case	3
Serious questions are raised regarding the availablity of a writ of habeas corpus and the need to re-examine "fundamental unfairness", lack of probable cause", "harmless error" and mixed claims.	
Basis For Review By This Court	16
Arguments	
Point I	37
THE DENIAL OF THE PROSECUTOR TO PERMIT PETITIONER TO TESTIFY FREELY AND COMPLETELY BEFORE THE GRAND JURY AND THE PROSECUTOR TELLING THE TRIAL JURORS MATTERS WHICH WERE FALSE AND WHICH HE KNEW WERE UNTRUE,MADE THE ENTIRE PROCEEDING FUNDAMENTALLY UNFAIR, DENYING DUE PROCESS AND DENYING A FAIR TRIAL.	

Page

POINT II 50

THE PERFORMANCE OF DEFENSE COUNSEL WAS SO DEFICIENT, THAT ABSENT OF ERRORS AND OMISSIONS, THERE WAS REASONABLE PROBABILITY THAT THE JURY WOULD HAVE HAD REASONABLE DOUBT RESPECTING GUILT.

Conclusion 65

Appendix

Order Being Appealed Filed May 31, 1989 A-1

Denial of Motion For Reconsideration Filed June 14, 1989 A-4

Judgment Denying Writ Filed Jan. 11, 1989 A-6

Memorandum and Order of District Court Judge Kevin T. Duffy Filed Jan. 6, 1989 A-8

Order of Prior Second Circuit Panel Affirming the Opinion of District Judge Leonard B. Sand Denying Writ as to a First Petition Filed November 25, 1986 A-21

Certificate of State Court Conviction. Trial ended April 19, 1983. Sentencing June 10, 1983 A-28

TABLE OF AUTHORITIES

	Page
Berger v. United States, 295 U.S. 78 (1935)	25
Donnelly v. DeCristoforo 416 U.S. 637, 645 (1979)	47
Estate of Sydney Baron v. Comm IRS, 798 F2d 65 (1986)	7
Jackson v. Virginia 443 U.S. 307,319 (1979)	49
Kuhlman v. Wilson 477 U.S. 436, 106 S.Ct2616(1986)	26
People v. Theodore Friedman NY Law Journal 10/8/88	42
People v. Stanley Friedman NY Law Journal 8/6/87	42
People v. Worthy 492 N.Y.S.2d 422 (2d Dept,1985)	51
Quartarro v. Fogg 86 Civ 2337(ERK) Feb. 1988	52
Rose v. Lundy 455 U.S. 509, 102 S.Ct 1198(82)	16
Sandstrom v. Montana 442 U.S. 510 (1979)	29
Strickland v. Washington 104 S.Ct 2052, 466 U.S.668-92 ('84)	30,64

TABLE OF AUTHORITIES

Page

United States v. Cronic 55
466 U.S. 648, 656 (1984)

United States v. Kilpatrick, et.al. 46
594 F Supp 1324 (1984)
575 F Supp 1324 (1983)

United States v. LaRouche Campaign 24
829 F. 2d 250

United States v. Mechanic 1,23,24
475 U.S. 66,67 (1986)

U.S. v. Midland Asphalt Corp. 24
840 F. 2d 1040, 1046 (2d Cir '88)

U.S. v. Taylor 24
798 F 2d 1337

Wilson v. Henderson 26
742 F 2d 741 (1984)
584 F 2d 1195 (1978)

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth, Sixth and Fourteenth Amendments of the United States Constitution, having been denied due process, effective assistance of counsel and equal protection of the law.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

RAYMOND MIRRER,

Petitioner,

-against-

KEVIN T. SMYLEY,

Commissioner of Probation,

Respondent.

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Second Circuit

This petition for certiorari arises out of the Second Circuit's affirmance of the denial of a writ of habeas corpus by the District Court of the Southern District of New York.

ORDER BEING APPEALED

The Circuit Court was inclined to exert little effort with respect to a second habeas petition of petitioner, relying solely upon inapplicable findings as to a first petition. The Second Circuit affirmed a decision of Judge Kevin T. Duffy of the District Court for the Southern District of New York, filed on January 6, 1989, in a one-liner unpublished decision by an Order of May 31, 1989. A motion for rehearing and reconsideration was denied on June 14, 1989. Judge Duffy adopted the role as described by Justice Thurgood Marshall in United States v. Mechanic, 475 U.S. 66,67 (1986). Justice Marshall predicted that the majority decision would have an adverse effect of permitting busy district judges to lighten

their workload with less work and reduce the law to "pretend rules". Such contempt of the law by Judge Duffy and the Second Circuit, in ignoring claims involving serious constitutional violations which were not prevalent in the first petition, demands the attention and action by this Court.

JURISDICTION

The jurisdiction of the Federal Court is invoked under 28 U.S.C. 2254, alleging unlawful custody at the time a petition for a writ of habeas corpus was filed on April 18, 1988. There was a subsequent termination of custody on October 31,1988. Due to questions raised by the Second Circuit during oral argument as to whether the panel should consider the appeal due to the termination of custody, it is important that this Court affirm that

discharge from probation does not divest jurisdiction.

STATEMENT OF THE CASE

On January 18, 1982, six defendants were indicted by the New York County District Attorney for crimes committed by only three of them. Petitioner, a tax lawyer, not a principal or agent, was completely independent. The other defendants were part of the client group, International Venture Capital, Ltd. ("IVC"). IVC was a newly-formed entity that marketed coal tax shelters programs in 1979 and 1980. Petitioner, alone, cooperated freely with members of the District Attorney staff, and upon being advised that he was a "target", without being given reasons, except that he had issued tax opinions, waived immunity and voluntarily appeared before the Grand Jury.

He was grossly mistreated, constantly interrupted and was deliberately denied the opportunity to return to answer questions as had been requested by the Grand Jurors.

The three principal defendants, who misused investor funds, were found guilty on April 19, 1983, of all five of the charged crimes. Mirrer was cleared of the felony crimes of (1) grand larcency and (2) scheme to defraud. He was found guilty of the felony of (3) filing a false instrument (New York State tax returns) with an intent to defraud the State of New York, (4) the misdemeanor of entering into a conspiracy to commit one or more of three felonies and (5) the misdemeanor of misleading investors under the State securities laws. Mirrer claims that he acted professionally in accordance with acceptable practices; that he did not conspire with anyone to engage

in felonious conduct; that he did not intend to mislead or defraud anyone, and most important, no evidence was presented at trial to prove that knowingly false tax returns were filed. Deferred tax deductions were subsequently disallowed due to lack of business activity, not due to fraud. Petitioner had no control over the business operations; he did not benefit from any fruits of the crime, as had the top three defendants, and he actually lost money on the professional engagement.

The prosecutor and the trial Judge, Justice Benjamin Altman, who also handled pre-trial proceedings, erronerously considered the tax shelters as being fraudulent because of a leveraged 4:1 tax write-off. A tax deduction was taken for three times the amount of the cash investment, due to the execution of a full

recourse Promissory Note in the amount of $75,000 for a $25,000 cash payment. A prosecution tax expert, who never used the term "fraudulent", testified that it was his belief that the deductions were "invalid" due to abusiveness. However, upon cross-examination, it was shown that the tax expert was incorrect in his calculations that led to such erroneous conclusion. A defense tax shelter expert fully supported the tax structure and the deductions, as did over 200 independent tax advisors, most of whom were lawyers and certified public accountants, who recommended these programs to their clients who were sophisticated investors. Also, four prior law firms had rendered tax opinions on the same tax structure, so that Mirrer was in no different position than other lawyers who had previously been

engaged to perform similar services.

Trial evidence showed that the Mirrer law firm performed a high degree of due diligence, and in fact, refused to issue a tax opinion, for lack of adequate documentation, for the one program marketed in 1980, The Mayfair Program. Yet, he was unlawfully charged with issuing false tax opinions during 1979 and 1980. The term "false" was fraudulently misused by the prosecutor. He was aware that Mirrer merely undertook a professional engagement, as normally handled by other tax attorneys.

The gross misconception and prejudice regarding leveraged write-offs in tax shelters that prevailed in 1982 was clarified by a 1986 Second Circuit decision, Estate of Sydney S. Baron v. Comm. IRS, 798 F2d 65, in which Judge J. Edward Lumbard participated. It involved

a 7:1 tax write-off, yet, nobody went to jail. The Circuit Court concluded that an investment may be made by cash plus a non-recourse Promisory Note, permitting a tax deduction of the total sum, provided the property securing the Note had sufficient market value. In the IVC programs, a full recourse Note was executed, with funds advanced against the Note and appropriate interest charged to the investor. Since no profits were generated as a result of an investment in the IVC tax shelter programs, the amount of the deferred tax deduction represented by the Promissory Note was subsequently disallowed, with interest and penalties. Thus, neither the State nor the Federal Government, suffered any loss. In a finding of fraud, if any, the penalties are greater and the taxpayer is subject to criminal prosecution. Since noone

testified as to fraud with respect to the IVC tax shelters, this Court need not consider the multitude of smokescreens presented by respondent. The fundamental issue here is not tax shelters, but, a violation of constitutional rights and the denial of due process.

The chronology of petitioner's past involvement in criminal proceedings, is as follows:

1. Denial of motion by State Criminal Court Justice Altman at about July, 1982, to dismiss the indictment for lack of probable cause and certain gross misconduct of the prosecutor during the Grand Jury proceedings.

2. Denial by Justice Altman of several severance and mistrial motions, in the interest of justice. A jury verdict was rendered on April 19, 1983.

3. Denial of Pro Se Post-Trial motion at about May, 1983, by Justice Altman to set aside the conviction for lack of evidence and limited claims of ineffective assistance of counsel.

4. Affirmance of convictions as to all five appellants by the State Appellate Court on June 25, 1985, which concluded that all errors were "harmless" and erroneously concluding that the evidence against each defendant was substantial. Leave to Appeal was denied by the State Court of Appeals.

5. Denial of Pro Se Post-Appeal CPL 440.10 motion on August 14, 1985, by State Criminal Court Justice Carol Berkman, who replaced Justice Altman due to his retirement. Claims were made of prosecutorial misconduct and ineffective assistance of counsel. However, they were

limited in scope.

6. Incarceration of petitioner from August 14, 1985 through December 13, 1985 in the serving of a reduced six months jail term plus the serving of 4-1/2 years of probabation, which term resulted in early termination, effective October 31, 1988.

7. Filing of a federal petition for a writ of habeas corpus on September 3, 1985, while incarcerated, which had limitations due to a lack of experience of petitioner in Federal matters. Relief was denied by District Court Judge Leonard B. Sand on June 20, 1986. However, Judge Sand conceded that Mirrer had a "unique claim" in ineffective assistance of counsel and misrepresentation of evidence by the prosecutor, stating that, ..."it is questionable whether such has been exhausted and petitioner failed to make any

demonstration in this regard." Judge Duffy, in the second petition, refused to give such significant conclusion the weight which the "unique claim" deserved, thus, negating the value and intent of a second petition.

8. Affirmance of the Opinion of Judge Sand by the Second Circuit on November 25, 1986, based upon limited claims raised before Judge Sand who reached an erroneous conclusion of guilt, not having considered inumerable false representations made by the prosecutor which unlawfully made it appear that petitioner was guilty. This Court denied a Writ of Certiorari on October 13, 1987.

9. Return to the State Court on October 27, 1987 to present unexhausted claims, hopefully before a new, independent Judge. However, respondent intentionally

arranged to have this second CPL 440.10 motion assigned to Justice Berkman who had previously expressed an unwillingness to upset prior findings. She denied a hearing on this new CPL 440.10 motion, rendering a decision on December 28, 1987. She attempted to justify her refusal to act by commenting that Mirrer's protestations of innocence was nothing more than the actions of a "disgruntled defendant, unable to accept the jury's verdict of his guilt". Like Judge Duffy, she refused to apply the rule of law. All of the Judiciary have refused to consider that Mirrer could not possibly be guilty of the felony crime of filing false New York State tax returns when no proof was presented at trial to show that knowingly false tax returns were filed.

10. Motion was made for Leave to Appeal to the State Appellate Court the denial of relief by Justice Berkman as to previously unexhausted claims and an alternative motion was made for a writ of error coram nobis. Both were denied on March 15, 1988. A rehearing motion was denied on May 5, 1988. Thus, petitioner made two attempts to gain access to the State Appellate for the review of new constitutional claims, but to no avail.

11. A second Federal habeas petition as to previously unexhausted claims was filed on April 18, 1988. It was assigned to District Court Judge Kevin T. Duffy who rendered a scanty 7-1/4 page decision, after a 5-1/2 month delay, filed on January 6, 1989, denying the petition. He acknowledged that all state remedies had been exhausted; that Mirrer's claims in the

second petition are "not identical" to those in the earlier petition, but they "are sufficiently similar". He rejected arguments of respondent to dismiss the petition and he stated that he would review the merits of the claims. Judge Duffy then elected to rely solely upon the previous decision of Judge Sand and the subsequent Circuit panel affirmance. This was pure error. The second petition contained new claims of the misconduct of the prosecutor, plus other errors of constitutional magnitude which clearly made the trial fundamentally unfair.

12. The Second Circuit affirmed the Judge Duffy decision on May 31, 1989 "for substantially the reasons" set forth by Judge Duffy. Since Judge Duffy did not address the fundamental unfairness issue of the new claims, his findings and the

affirmance by the Circuit Court, made the proceedings in the Court below a mockery in a miscarriage of justice of the greatest magnitude.

BASIS FOR REVIEW BY THIS COURT

The Second Circuit was amiss in failing to consider a distinction between "not identical" claims made in a second petition, considering that this Court has determined that unexhausted claims must not be mixed with exhausted claims. Thus, it is incumbent upon this Court to re-evaluate the impact of Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198 (1982). The actions of Judge Duffy parallel the actions of the District Court for the Middle District of Tennessee, except in reverse circumstances. The Tennessee Court granted a writ, acknowledging that two of four claims had not been exhausted. The Sixth Circuit

affirmed because the prisoner's constitutional rights had been seriously impaired. This Court reversed, with Justice Sandra Day O'Connor delivering the majority Opinion that mixed petitions should be dismissed. Justice John Paul Stevens, dissenting, stated that, while most petitions lack merit, there are cases in which serious injustice must be corrected by the issuance of a writ, and that, when a person's liberty is at stake, there is no justification for the creation of needless procedural hurdles. Justice Stevens felt that the Sixth Circuit should have been affirmed to avoid additional procedures of returning to the State Courts, notwithstanding that evidence of guilt was convincing. The majority held that the District Court committed two procedural errors by considering portions of the trial

record described in the unexhausted claims in evaluating the claims that had been exhausted. Justice Stevens believed that a distinction should have been made as to the type and nature of the error. While some errors are harmless, others are so fundamentally unfair that they infect the validity of the underlying judgment, or the integrity of the process by which such judgment was obtained. He further stated, that concepts of "fundamental fairness" are not frozen in time and that errors of constitutional magnitude justify collateral relief no matter how long a judgment may have been final. Justice Stevens further believed that in returning to the lower Courts, the result would be the same in the issuance of a writ because the trial violated constitutional rights, thus, feeling that it was outrageous to require

another round in the state and federal judicial system. Mirrer had the opportunity of making a second round, but all doors remained closed, including the Second Circuit's laxity in rendering a "one-line" affirmance of the denial of a writ.

The procedural errors attributed to the Tennessee District Court, as discussed in Rose v. Lundy, supra., apply with equal weight to the New York Southern District Federal Court, warranting reversal of the Judge Duffy decision and the issuance of a writ. The Rose doctrine, which requires a return to the State Courts and the lower Federal Courts for unexhausted claims, places a defendant in jeopardy and violation of his constitutional rights if a District Judge, as was done by Judge Duffy, bases his decision as to a second petition upon a decision rendered with respect to previously

exhausted claims made in the first petition. Judge Duffy stated in his decision that the Second Circuit noted that the prosecutor's misrepresentation "did not cause such fundamental unfairness as would support a petition for writ of habeas corpus." This was based upon a narrow prior claim involving one comment, consisting of "one paragraph in two hundred pages of summation". The second petition did not involve such comment. It included other material, being "not identical" claims, which leaves no doubt that petitioner was denied a fair trial.

Justice requires that this Court take a position on this fundamental concept to show support for a requirement that District Courts must consider new claims on their own merits and not be guided by conclusions reached by a prior District

Court Judge on the basis of weak claims previously presented. In the instant case, another District Court reached conclusions, based upon speculation, not evidence, relying upon fraudulent representations made by the prosecutor. The basis for the the second petition was to present new claims of such fraudulent representations, leaving no doubt as to "fundamental unfairness".

The second panel of the Second Circuit showed confusion as to the basis and purpose of habeas relief. During oral argument, two panel members implied that the appeal might be moot because petitioner was no longer in custody. This Pro Se petitioner was compelled to do the research that was the obligation of the Court, following such curious remarks. Subsequently, petitioner filed letters with the Court below, dated May 19th and May 23, 1989, which outlined

discussions given in Vol 39 of Corpus Juris Secundum, clarifying that a habeas proceeding is not be used merely to "produce the body". Its purpose is to provide a speedy remedy or adjudication of a person's right to liberation from illegal restraint or to be free of whatever society deems to be intolerable restraints. Here, petitioner was not only unlawfully jailed, but he continues to remain disbarred as a Member of the New York Bar, an intolerable restraint, due solely to a gross misuse of power by the by the prosecutor as to Mirrer. The Manhattan District Attorney turned a simple fraud case (misuse of investor funds by the client, unknown to petitioner), into one of alleged tax shelter fraud so as to permit his Office to qualify for the receipt of several million dollars of Federal funds, whereby three crooks were convicted while

three innocent victims were also indicted to make bigger headlines.

Judge Duffy would not accept reasoning, backed by trial evidence, that Mirrer was indicted and convicted for a non-existent crime. He relied, in error, upon United States v. Mechanic, 475 U.S. 66,67 (1986). The Second Circuit likewise fell prey to the loophole created by the Mechanic decision. Justice Thurgood Marshall gave a prudent warning, in a minority opinion, that Judges would be inclined to rely upon such decision to avoid doing work and to needlessly shut the door to meaningful constitutional claims. Justice William H. Rehnquist delivering the majority opinion of Mechanic, held that conviction by a petit jury demonstrates that there was probable cause to charge the offense. However, the First, Ninth and Tenth Circuit have each

viewed Mechanic differently, taking into consideration the wise comments of Justice Marshall in his dissent. The Second Circuit adopted both the Ninth and First viewpoints in United States v. Midland Asphalt Corp., 840 F. 2d 1040, 1046 (2d Cir, 1988). The Tenth Circuit adopted a narrow interpretation so as not to preclude post-conviction review of most allegations of Grand Jury irregularities, stating in United States v. Taylor, 798 F.2d 1337, that issues of violation of constitutional rights and "fundamental unfairness" would be appealable after conviction and not subject to the Mechanic harmless error analysis. The First Circuit, in United States v. LaRouche Campaign, 829 F.2d 250, agreed with the Tenth Circuit. Now, it is necessary for this Court to reverse the Second Circuit, in the interest of justice, and to provide

uniformity for each of the Circuits.

Judge Duffy improperly applied Mechanic. He should have cited Berger v. U.S., 295 U.S. 78 (1935). In such landmark case, Justice George C. Sutherland, speaking for a unanimous United States Supreme Court, which reversed the Second Circuit, as seems a prevalent occurence due to a continous misunderstanding by the Second Circuit as to the use of the habeas writ, stated, that, "...the prosecutor had injected his own personal belief concerning the facts of the case and that it was not his duty to merely win a case but to see that justice is done. He may strike hard blows, but he is not at liberty to strike foul ones". This is precisely what Mirrer's prosecutor, John Moscow did. He engaged in impermissible conduct during summation, telling jurors matters which he knew were not true.

During 1986, this Court dealt another blow to the Second Circuit in Kuhlman v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, acknowledging that there was a difference of opinion as to the proper standard for the availability of federal habeas relief. Shockingly, a second panel granted a writ to an admitted murderer, notwithstanding that a prior panel affirmed the denial of a writ in Wilson v. Henderson, 584 F2d 1185 (2d Cir. 1978). The Court below , in the Mirrer case, was baffled as to the use of the writ, ignoring valid claims of an unusually highly-educated petitioner. Mirrer had the unique distinction of having been licensed in the three professions of engineering, law and as a certified public accountant, yet, a writ was denied to a him, notwithstanding that he could not have possibly committed the crimes for which he was charged.

One of the ironies of this case is the conclusion reached by the District Court Judge Sand that Mirrer's defense counsel did an acceptable job, in spite of the fact of an innocent person spent time in jail. Judge Sand had not considered the fraudulent representations of the prosecutor and "errors and omissions" of defense counsel, as outlined in the second petition. Six Circuit Court Judges and a second District Court Judge erroneously agreed with Judge Sand and each other that Mirrer, an honest lawyer, should have been convicted. Each used irreconciliable reasoning. Petitioner finds it difficult to accept such complete failure of the Courts to apply sound legal principles and not to have used good, old-fashioned common sense.

Mirrer pleads for this Court to address the issue as to how and why a Circuit Court

permitted Judge Duffy to ignore the conclusion of Judge Sand that Mirrer had a "unique claim" that was not exhausted and permitting Judge Duffy to treat admittedly "not identical" claims in a second petition as if they were similar to the claims in the first petition. The first panel wrote, in its decision, that it had considered "one paragraph" in two hundred pages of summation. The second petition involved over forty pages of summation, all of which Judge Duffy ignored, concluding that such "one paragraph" alluded to by the panel, did not amount to "fundamental unfairness". The issue of this second petition is, among other things, many unlawful remarks and, the summation as a whole, that made the trial fundamentally unfair.

Mirrer's trial lawyer made an appropriate motion for mistrial due to

Moscow's unlawful comments during summation. He cited the Sandstrom case to the trial Judge, Sandstrom v. Montana, 442 U.S. 510 (1979). In such case, the Court held that it was a Fourteenth Amendment due process violation to tell jurors that a defendant "purposely or knowingly" committed a crime without proof of "intent". Moscow, on several occasions, unlawfully expressed his personal conviction to the jurors, saying, repreatedly, at least fifteen times, "I suggest", and misrepresenting that the person who signed off on the invalid tax opinion engaged in fraud.

This petition should draw the interest and concern of Chief Justice William H. Rehnquist, Justice Thurgood Marshall, Justice John Paul Stevens, Justice Sandra Day O'Connor, as well as the other Justices. It involves serious problems in the

treatment of unexhausted claims which must be addressed. It also shows gross confusion by the Second Circuit as to the availability of the writ. Petitioner provided clear-cut examples of "unfairness", lack of probable cause, and "errors and omissions" of defense counsel as alluded to in Strickland vs. Washington, 104 S. Ct.2052 (1984). This case is one of alleged "white collar" crime in which no crime was proven as to petitioner, yet, Judges were lax in accepting fraudulent representations made by a lying, scheming prosecutor. Also, Wall's deficiency was obvious in the light of other tax shelter fraud cases having being dismissed or defendants acquitted, unless some witness testified as to actual fraud, such as the reporting of known fraudulent deductions. This did not happen here. Mirrer issued tax opinions that conformed

to normal and acceptable standards, with customary risks and warnings. This is not a crime. Criminal conduct of a client should not attach to the lawyer in the absence of tangible evidence that the lawyer intended to engage in felonious conduct. Tax deductions taken by investors, having been guided by their individual and independent tax advisors, were based upon an advance royalty payment made by a Limited Partnership, which did not exceed 80% of the value of the estimated coal reserves. This was permitted by IRS regulations. The value of the reserves was taken from a computer printout, using data obtained from government geology reports. Mirrer's defense counsel missed too many opportunities in not thoroughly explaining and convincing the jury that Mirrer could not possibly be guilty of the filing of

false tax returns or a conspiracy to file false tax returns or be guilty of a deliberate intent to mislead investors.

Judge J. Edward Lumbard, who served on the panel that denied a writ to petitioner, wrote an Opinion in David Brooks vs. Everett W. Jones, Docket No. 88-2245, decided May 12, 1989, granting a writ to a criminal who had been incarcerated for nine years. The writ had been denied by the District Court, stating that a writ of error coram nobis should have been filed, knowing that it is always denied. While the writ issued by the Second Circuit was of a limited nature to permit an expedited State Court appeal which had been neglectfully delayed, Judge Lumbard was critical of the State Court, claiming a "mockery of the right to appeal...which cannot be overlooked". Also, "...we are sympathetic to the problems associated with

processing indingent appeals in the state system.." and that, "federal habeas review remains available to protect indingent prisoners' rights to appeal". Judge Lumbard agreed to the granting of another writ to a convicted murderer, on May 26, 1989 in Alexander v. Connecticut, Docket No. 88-2318, ordering that Alexander be released if he were not retried within a reasonable time. Judge Lumbard and the other assigned members of the panel, reversed the District Court due to a Fifth Amendment violation. Mirrer failed to receive equal treatment in having been denied relief upon a showing that Mirrer's Fifth, Sixth and Fourteenth Amendment rights were violated. Since Mirrer was not a hardened criminal and was not represented by dominant counsel, the Second Circuit treated Mirrer's petition and appeal as if violations never existed.

As to Mirrer, only one State appeal was permitted as a joint appeal with proven crooks. Limited arguments had been made by Court-assigned appellate counsel who relied primarily on trial errors, failing to consider constitutional issues. Thereafter, all doors remained closed in the State Courts as to hearings on new claims. Judge Duffy continued to keep the door locked, and the Second Circuit, elected not to comment on the scanty, irreconcilable decision of Judge Duffy, except to say that the panel agreed with the District Court. Thus, Mirrer was left in the same position as David Brooks, whose appeal rights had been forestalled with obstacles. In Mirrer's case, a fair hearing by the State Appellate Court as to newly unexhausted claims was flatly denied. Judge Lumbard, who acted as the champion of the fundamental rights as to

hardened criminals, such as Brooks and Alexander, concurred, in error, with his brethren on the Circuit panel to deny habeas relief to Mirrer, a professional. Justice demands that Mirrer's status as a convicted felon be set aside, his having been required to spend time in jail for merely performing his job as a lawyer.

A critical issue that needs to be addressed by this Court is the treatment of a successive petition. If the State Courts refuse to provide appellate review for newly unexhausted claims and a District Court Judge determines that he will not upset findings in which a prior District Court concluded that a jury was justified in reaching a verdict of guilt, the treatment of such successive petition amounts to a denial of federal constitutional rights. Here, petitioner claims that the prior

District Court and the Circuit panel which affirmed, did not consider that the jury verdict was based upon fundamentally unfair comment by the prosecutor and material "errors and omissions" of trial counsel. While the prior Circuit panel did comment on the prosecutor's actions, as well as on the performance of defense counsel, it was plain that the comments were not based upon the different claims made in the second petition. Judge Duffy was in error not to have given due weight to the new claims without having been misguided by earlier erroneous decisions. Due to the failure of Judge Duffy and the second Circuit panel to have considered the new claims on a separate footing, to which petitioner has a federal constitutional right, this Court must and should grant certiorari to assure that petitioner's rights are not obliterated.

POINT I

THE DENIAL OF THE PROSECUTOR TO PERMIT PETITIONER TO TESTIFY FREELY AND COMPLETELY BEFORE THE GRAND JURY AND THE PROSECUTOR TELLING THE TRIAL JURORS MATTERS WHICH WERE FALSE AND WHICH HE KNEW WERE UNTRUE, MADE THE ENTIRE PROCEEDING FUNDAMENTALLY UNFAIR, DENYING DUE PROCESS AND DENYING A FAIR TRIAL.

The intent of Congress was to provide habeas relief in instances of fundamental unfairness, such as error of such fundamental defect that it inherently results in a complete miscarriage of justice. Mirrer was indicted, as a co-conspirator in having allegedly agreed to sell fraudulent tax shelter investments. Due to a failure of proof that the shelters were fraudulent, the prosecutor, using false and unlawful statements, told the petit jury that "invalid tax shelters are a crime" and that "the person who signed off on the

invalid tax opinion engaged in fraud." "He signed the tax opinion. It was invalid". "I suggest that Raymond Mirrer acted intentionally to obtain money, profit and property, working with others to sell securities. I suggest that he did this with the intention of obtaining money from investors...that he acted as part of an ongoing scheme to defraud people...I suggest that this is the essence of a swindle." "He signed the tax opinion...he did not author it..." (implying that Mirrer stole the tax opinion). "He made statements in the tax opinion about which he was wrong...he took part in a deal where he knew that the truth was not what was contained in the book but was different." The prosecutor then deliberately mislead the jury by telling them that the evidence as to all of the defendants were overwhelming, but, "I

suggest that the evidence on the tax count as to Herman Friedman is not as overwhelming as there is on every count or every other defendant. The prosecutor expressed his personal conviction as to guilt, using the term, "I suggest", at least fifteen times, without referring to specific evidence, knowing that there was no evidence to prove that Mirrer conspired with anyone to engage in felonious conduct or that Mirrer intentionally intended to defraud and mislead investors. Few tax opinions are original. The prosecutor was aware that Mirrer received permission from a prior law law firm to use its material, which was the property of the client. Mirrer made appropriate changes in the tax opinion, which outlined many risk factors and warnings, and the Mirrer law firm performed extensive due diligence work before signing

any tax opinion. It was reversible error and fundamentally unfair for the prosecutor to have told the jurors that "invalid tax shelters are a crime" and that Mirrer knowingly made statements with an intent to defraud investors and engage in a "swindle". None of the prosecutors remarks were supported by any evidence. An allegation of prosecutorial misconduct must be apprised against the whole context of the trial, not only "one paragraph in two hundred transcript pages of summation."

Mirrer was the only one of six defendants who cooperated freely with members of the District Attorney staff and who waived immunity to testify before the Grand Jury. He had a constitutional right to face his accusers. He was denied due process by being constantly interrupted and being denied the opportunity to answer Juror

questions. The record shows that, after being dismissed from the Grand Jury room, the prosecutor chased after him in the hallway, in the presence of his then attorney, Lawrence Yudenfriend, Esq., to advise that the Jurors requested that Mirrer return at a later date to answer questions, to which he agreed. The Juror stated that, "...people might have questions, but it might take a long time." Thus, it was evident that the Jurors had many questions, that might take a long time, but the prosecutor railroaded the indictment against Mirrer without giving him his constitutional right to return. This amounted to grave prejudice. The propensity for misconduct practices by the prosecutor, John Moscow, during Grand Jury proceedings was later highlighted when Justice Marie Santagana, of the State Criminal Court, dismissed an

indictment in August, 1987, in People v. Stanley Friedman. She claimed that John Moscow "gave legal instructions so inadequate and misleading that they impaired the integrity of the proceeding". On October 5, 1988, it was reported in The New York Law Journal in People v. Theodore Friedman, that James LaRossa, a highly-regarded criminal defense attorney, told a jury that prosescutor Moscow manufactured "one of the great frauds of all time" in unlawfully indicting a successful lawyer, the husband of a New York State Supreme Court Justice. The jury acquitted Friedman in November, 1988, one juror saying, as to the trial, while several of the jurors asked to meet with the defense attorney after the verdict, "It stunk". It was further reported that they complained that Moscow..."went beyond anything that was

reasonable...can anything be done about John Moscow?" Judge Duffy and the Circuit Court chose to ignore any and all claims as to unlawful practices of John Moscow. None of the foregoing claims had been presented in the first petition. The reaching of a decision as to the second petition, solely based upon findings made as to the first petition, was gross prejudice and reversible error.

Recently, this Court rendered two decisions, by a split Court, which, while being unrelated to the matter herein, showed concern for human rights and the integrity of our justice system. In U.S. v. Monsanto, No. 88-454, Justice Harry A. Blackmun expressed a belief that the majority decision "seriously undermines the basic fairness of our criminal justice system". In Texas v. Johnson, No. 88-155, Chief

Justice William H. Rehnquist, in a dissenting opinion, stated, "Surely, one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive..." Nothing could be more evil, offensive and fundamentally unfair than to have a prosecutor make comments to a Grand Jury and/or a trial jury, of a highly prejudicial nature which he knows are not true. It is incumbent upon this High Court to affirm the words and wisdom of Justice George C. Sutherland, stated earlier, that a prosecutor, such as John Moscow, "may strike hard blows, but he is not at liberty to strike foul ones".

Two Denver District Court Judges, Judge Fred M. Winner and Judge John L. Kane, Jr., showed enragement at the gross misconduct of federal prosecutors to gain indictments

in a case, described in 1982 as being one of the largest tax fraud cases in United States history. Seven defendants plus a Bank were indicted on 27 counts, including conspiracy, tax and mail fraud plus obstruction of justice. Judge Kane dismissed 26 counts and William A. Kilpatrick, Jr. alone was tried before a jury and before Judge Winner on the obstruction of justice charge. Judge Winner granted a motion for a new trial after a guilty verdict, claiming that the U.S. Justice Department in Washington, D.C., in an abuse of process, sent three tax attorney prosecutors to Denver to try a relatively simple obstruction of justice case, treating it as one of tax shelter crime, notwithstanding that the tax fraud counts had been dismissed. The Tenth Circuit reversed the conviction and ordered remand to the trial Court. Since Judge Winner had

retired, the case came before Judge Kane a second time and he dismissed the second indictment, claiming that "prosecutors and investigators had knowingly and purposely committed numerous abuses of the rules of Federal Court procedures and constitutional principles". And, "the Grand Jury was converted into little more than a rubber stamp". Judge Kane found violations of the Fifth and Sixth Amendments. U.S. v. Kilpatrick, et. al., 575 F Supp 325 (1983) and 594 F Supp 1324 (1984).

The Second Circuit chose to ignore such findings of the Tenth Circuit wherein circumstances of misconduct were parallel. In both the Kilpatrick cases and the Mirrer case, claims were made of tax shelter fraud, yet no such fraud was proven. In the Mirrer matter, the actual crime was misuse of investor funds by the three principal

defendants. Not one witness testified as to tax fraud, thus, as a matter of law, an indictment or a conviction could not be sustained for conspiracy, deceit and the filing of false New York State tax returns. Tax deductions were disallowed four years later for lack of business activity, not for fraud or intent to defraud.

Mirrer is entitled to equal protection of the law. The holdings in Kilpatrick apply to Mirrer. It was error for the Second Circuit not to adopt the sound findings of the Tenth Circuit, requiring an exercise of this Court's power of supervision. Under Donnelly v.DeCristoforo, 416 U.S. 637, 645 (1979), habeas relief is warranted when the prosecutor's misrpresentations, as clearly shown, renders the trial fundamentally unfair. The prosecutor's "flagrant and unconscionable"

conduct, acting with an undisguised contempt for the rule of law, justifies the dismissal of an indictment after trial and the vacating of a judgment of conviction. Justice and duty cannot tolerate an abuse of process and deliberate misrepresentations solely to win a case. In Donnelly, Justice Rehnquist, writing for six members of the Court, held that the prosecutor's remarks, in the context of the entire trial, were not sufficiently prejudicial. Such case involved a convicted murderer and the issue was only one comment. In the Mirrer case, as to the first petition, it also involved only one comment. The second petition encompasses a wide range of misconduct, making it clear that the general tenor of the trial was the use of a dialogue of deliberately falsified comments against Mirrer, an honest lawyer, who was merely

doing his job. Jackson v.Virginia, 443 U.S. 307, 319 (1979), holds that it is unconstitutional to convict any person, except upon proof sufficient to convince a federal judge that a rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt. Mirrer's second petition is further unique, because, as to the first petition, District Court Judge Sand did not consider the wide range of the prosecutor's misrepresentations. He improperly reasoned that there was sufficient evidence to establish guilt when there was no such actual evidence, erroneously treating the prosecutor's comments as evidence. As a matter of law, Mirrer could not be found guilty of conspiring to sell fraudulent tax shelters and aiding in the filing of false tax returns in the complete absence of evidence

as to each of these criminal charges. Our entire concept of justice is in jeopardy if a second District Court Judge is permitted to consider matters based upon old claims in reviewing new claims. Such policy totally negates the effect and use of a successive petition. The Rose v. Lundy doctrine requires that unexhausted claims be submitted to the State Courts and then submitted for review in the Federal Courts. This doctrine cannot work if the Courts do not treat new claims, which have constitutional magnitude, independently of the old claims. This crucial point of law must be addressed by this Court, requiring the issuance of a writ of certiorari.

POINT II

THE PERFORMANCE OF DEFENSE COUNSEL WAS SO DEFICIENT, THAT ABSENT OF ERRORS AND OMISSIONS, THERE WAS REASONABLE PROBABILITY THAT THE JURY WOULD HAVE HAD REASONABLE DOUBT RESPECTING GUILT.

Independently of the misconduct of the prosecutor, a writ should issue due to ineffective assistance of counsel. Judge Sand had recognized that Mirrer had a "unique" situation which had not been fully exhausted. The first Circuit panel considered old claims as to ineffective assistance of counsel that were limited to alleged unpreparedness and the delivery of a summation that allegedly evidenced a conflict of interest. Following the affirmance of Mirrer's conviction by the State Appellate Court, First Department, the Second Department Appellate Court, citing Strickland, reversed a conviction for ineffective assistance of counsel in People v. Worthy, 492 N.Y.S. 2d, 423 (1985). The Court reasoned that defense counsel's summation consisted largely of counsel's irrelevant personal opinion of

the innocence of his client, such weak summation having been so inadequate as to have deprived the defendant of his constitutionally protected right to a closing argument. In Quartarro v.Fogg, 86 Civ. 2337 (ERK), reported on or about February 11, 1988, District Court Judge Edward R. Korman of the Eastern District of New York, in a 100-plus page Opinion, granted a writ to a convicted murderer, claiming that shoddy legal representation violated the defendant's Sixth Amendment constitutional rights, such as having provided an "inept" summation. Among other things, the lawyer "sat on his hands" during the trial. Wall, an import from Boston, inexperienced in New York State criminal law practice, and faced with a highly bias trial Judge, was overly confident that the case would be won on

appeal. He constantly "was on his feet," building an extensive record of errors. Mirrer's appointed appellate counsel was so overwhelmed by so-called errors, that he neglected other issues, as subsequently used by Mirrer in the second petition. To Mirrer's prejudice, the State Appellate Court, not having been asked to consider constitutional factors, concluded that all errors were "harmless". Judge Duffy and the second Circuit panel, relied upon prior holdings of so-called "harmless error". Each failed to consider that "fundamental unfairness" is appealable after conviction and is not subject to the harmless error analysis. Judge Duffy was in error in relying upon Mechanic.

Judge Duffy was also in error for not considering the "errors and omissions" of trial counsel, John Wall. He claimed that

both Judge Sand and the first Circuit panel "already determined that Wall adequately represented Mirrer". The first Circuit panel review of Wall's performance was limited to (1) an alleged conflict of interest, (2) the alleged lack of preparedness and the fact that (3) "Wall clearly articulated that he was appellant's attorney and emphasized appellant's innocence." These factors, alone, are not adequate standards for evaluating as to whether counsel's performance fell within an objective standard of reasonableness. Wall's summation was emotional, but it was a failure because total acquittal was not gained for an innocent victim. Wall's allotted summation time of four hours had been cut to two hours due to overruns by other counsel. He was ordered to start 4:30 P.M., after complaining that both he and the jurors were tired. He was told

that he must finish that same afternoon, resulting in a summation that lacked constitutionally effective assistance of counsel.

Judge Sand had cited United States v. Cronic, 466 U.S.648,656 1984), stating that a claim of ineffective assistance can only be made out by pointing to specific errors made by trial counsel, Id. at 666, and that petitioner "points to no specific circumstances that would justify a presumption of ineffectiveness." This conclusively shows that "errors and omissions" were not presented in the first petition. Thus, Judge Duffy and the Circuit panel erred in not considering specific circumstances of ineffectiveness as outlined in the second petition.

Rarely, does defense counsel admit frailty. Wall told the jurors, "...my style and tactics have been somewhat

different than all of the other defense lawyers...in spite of any personal and professional shortcomings, any abrasiveness that I exhibited in this trial..." "My clumsiness, abrasiveness, may have been poorly executed." Wall, was actually called an "outrageous asshole" by the prosecutor, as shown by the record. He acted as an "asshole" by unneeded yelling. He antagonized both the Judge and the jury. He was more concerned with dramatics and he failed to demonstrate needed knowlege of tax shelter practices. Judge Altman, visibly annoyed, remarked, "I don't know how many times you have practiced in Manhattan"... and..."You have used the word "outrage" since January 17th (the trial commencement date). Throughout the trial, Wall was nervous, irritable and disoriented, due in part, to his injury of his having fallen on the ice and being

heavily medicated. He sustained a painful hip injury and suffered with two broken ribs due to the fall.

Wall was negligent in not having introduced crucial evidence, a Supplement to The Mayfair Program, the only program sold in 1980 whereby the Mirrer law firm independently revised Risk Factor 13. Evidence showed that Mirrer was not responsible for the original language used in such Risk Factor which had been written by an independent securities law firm. Moscow tried to make the jury believe that the original language was a substantial factor in an attempt to deceive investors. He misled the jury as to its importance. Subsequently, realizing that the Supplement could backfire against him, Moscow took the initiative of introducing it. Wall set off in a rage because Justice Altman had refused its admittance when Wall attempted

to introduce it through the wrong witness after he had forgotten to introduce it through a witness that had specific knowledge. Following a heated sidebar conference, it was accepted into evidence as defendant's Exhibit "O", even though it had been offered, as a ploy, by the prosecutor. Wall was further shaken when he was unable to place into evidence a letter written by Mirrer to Edward Safran, the General Partner of Mayfair, which explained that Mirrer would not sign the tax opinion for Mayfair due to lack of adequate documentation. The letter was marked Mirrer Exhibit "HH". It was critical evidence, further proving Mirrer's independence, but was kept out due to the joint trial. Wall neglected to follow through on proper cross-examination of Safran and Mirrer Law firm lawyer, Peter Conner, to bring out the fact that Mirrer

refused to sign the tax opinion for the one program marketed in 1980, notwithstanding that the indictment as to Mirrer covered a conspiracy from on or about June 1, 1979 to on or about July 18, 1980. The crucial effect of this evidence was emphasized when the jury requested a copy of the signed Mayfair tax opinion during their deliberations. Since there was no such signed tax opinion, Justice Altman simply denied the request, without giving any reason. Such obvious prejudice, attributed to Wall's negligent and deficient performance, warranted the review and consideration by Judge Duffy and the Second Circuit. This substantial issue more than satisfies the doubt raised by Judge Sand when he mentioned that "petitioner points to no specific circumstances that would justify a presumption of ineffectiveness". Wall had omitted to discuss with the jury

the most important factor that conclusively showed Mirrer's independence, proving that he could not have been a co-conspirator. Another serious omission in this regard, is highlighted by a comment made by Justice Altman in having denied one of several Mirrer motions for severance, stating that, "I anticipate Mr. Mirrer's defense, if there is a defense, will be certainly antagonistic to two or three of the defendants". That prediction proved wrong. Wall provided no defense for Mirrer and he neglected to tell the jury that Mirrer had been deceived by the three top defendants, Firestone, Dorison and Gettinger. The prosecutor, during sentencing, stated the Mirrer had been "used and abused" by Firestone and Dorison. Wall "sat on his hands" on this significant issue. He committed further error by not attacking the credibility and bad faith of the

prosecutor. Mirrer was prejudiced by Wall's ill-chosen comment to the jurors, "I do not challenge Mr. Moscow's good faith, I do challenge his judgement and zealousness". Wall failed in his duty to challenge Moscow's misconduct to the jury. Defense counsel was deficient in not discussing the specific crimes and showing the lack of evidence as to each and every one of them. It was a gross omission to have merely told the jurors that Mirrer worked hard; he seemed like a good guy, an honest man; that "he can't be guilty of what his is accused of here". Wall had a duty not to simply engage in generalities. Wall failed to explain to the jury, as did Lawrence Iason, counsel for co-defendant, Albert Wahl, that efforts performed in investigating mining potential, such as visiting the coal lease properties and speaking to local miners and coal experts,

proved that there was a belief that mining would take place, showing that, in the filing of tax retunrs, there was no intent to defraud. Of the six defendants, only Wahl and Mirrer had visited the coal properties. Mirrer's law partner, Edward Ryan, who like Mirrer was both a lawyer and Certified Public Accountant, made five trips to Kentucky. He rendered reports as to each trip and expressed a belief that mining was feasible; that valid leases had been obtained to mine properties with adequate coal reserves and that contract miners were willing and were available with equipment and facilities to mine for the respective Limited Partnerships. Not having addressed these matters was a critical omission. Wall neglected to recognize its importance and significance until Iason's summation. Later, out of the hearing of the jury, he joined in Iason's

strong objections to Moscow's remarks to the jury in suggesting that they might acquit co-defendant, Herman Friedman, on the tax count because he had a bonus agreement, believing that mining would take place. Moscow, in extreme prejudice to both Mirrer and Wahl, stated, that the evidence to convict Friedman on the tax counts was not as "overwhelming as there is on every other count or every other defendant." Mirrer had claimed that six persons were indicted for crimes committed by only three of them. Of the bottom three defendants, Mirrer alone was convicted of the false filing crime which must be attributed to the deficient performance of Wall, mandating the issuance of a writ.

In Strickland, Justice Sandra Day O'Connor stated, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the

proper functioning of the adversarial process that the trial cannot be relied on having produced a just result". "The defendant must show that there is a resonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." She defined "reasonable probability" as a probability sufficient to undermine confidence in the outcome".

Raymond Mirrer stands as the only person, who, while acting professionally as an honest lawyer, was indicted and convicted due to the filing of tax returns by investors, which returns he never saw. They were prepared by experienced tax practitioners on behalf of each investor, whereby deductions were disallowed for lack of business activity, not for fraud.

As a matter of common practice and policy, people are not arrested and sent to

jail when tax deductions, not proven to be fraudulent, are disallowed. As a matter of law, there was never any basis for Mirrer to have been indicted and convicted. The Court below must be reversed so that Mirrer can be vindicated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Raymond Mirrer
Petitioner, Pro Se
320 East 46th Street
New York, New York
(212) 661-5770

July 14, 1989

A P P E N D I X

SDNY

88-CIV-2744

DUFFY(0860)

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 31st day of May, one thousand nine hundred and eighty-nine.

P R E S E N T :

HONORABLE J. EDWARD LUMBARD,

HONORABLE GEORGE C. PRATT,

HONORABLE FRANK X. ALTIMARI,

Circuit Judges.

- - - - - - - - - - - - x

RAYMOND MIRRER,

Docket No. 89-2027

Plaintiff-Appellant,

Filed May 31, 1989

-against-

KEVIN T. SMYLEY, Commissioner of Probatation,

Defendant-Appellee.

- - - - - - - - - - - - - - x

This appeal from a judgment for the United States District Court for the Southern District of New York, Kevin Thomas Duffy, Judge, denying a petition for a writ of habeas corpus cameon to be heard on a transcript of the district court record and was argued.

ON CONSIDERATION WHEREOF, it is now ordered that the judgment appealed from is affirmed.

Petitioner Raymond Mirrer appeals

from a judgment denying his second petition for writ of heabeas corpus. We affirm the district court denial of the petition for substantially the reasons set forth in Judge Duffy's opinion of January 5, 1988 (sic).

/S/_____
J. Edward Lumbard, U.S.C.J.

/S/_____
George C. Pratt, U.S.C.J.

/S/_____
Frank X. Altimari, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and it is not uniformly available to all parties, it shall not be reported cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Coruthouse, in the City of New York, on the fourteenth day of June, one thousand nine hundred and eighty-nine.

- - - - - - - - - - - - - - x

RAYMOND MIRRER,

Docket No. 89-2027

Plaintiff-Appellant,

Filed June 14, 1989

-against-

KEVIN T. SMYLEY, Commissioner of Probatation,

Defendant-Appellee.

- - - - - - - - - - - - - - x

A motion having been made herein by appellant pro se RAYMOND MIRRER, for

Rehearing and Reconsideration.

Upon consideration thereof, it is Ordered that said motion be and it hereby is denied.

ELAINE B. GOLDSMITH, Clerk

/S/_____

UNITED STATES DISTRICT COURT

- - - - - - - - - - - - - - x

RAYMOND MIRRER,

88 CIVIL 2744 KTD

Plaintiff-Appellant, JUDGMENT

Filed Jan. 11, 1989

-against-

KEVIN T. SMYLEY, Commissioner of Probatation,

Defendant-Appellee.

- - - - - - - - - - - - - - - x

Petition for a Writ of Habeas Corpus, pursuant to T. 28, U.S.C. Sec. 2254, having been submitted to the Honorable Kevin Thomas Duffy, U.S.D.J., and the Court on January 6, 1989 having handed down its decision denying the petition, it is,

ORDERED, ADJUDGED AND DECREED: That the petition be and it is hereby denied.

DATED: NEW YORK, N.Y.
January 11, 1989 /S/_____
Clerk

THIS DOCUMENT WAS ENTERED ON DOCKET ON 1-11-89

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - x

RAYMOND MIRRER,

88-Civ. 2744 (KTD)

Plaintiff-Appellant,

MEMORANDUM & ORDER

-against-

Filed Jan. 6, 1989

KEVIN T. SMYLEY, Commissioner
of Probatation,

Defendant-Appellee.

- - - - - - - - - - - - - - - x

APPEARANCES:

RAYMOND MIRRER
Pro Se Petitioner
320 East 46th Street
New York, NY 10017

HON. ROBERT M. MORGENTHAU
District Attorney, New York County
Attorney for Respondent
One Hogan Place
New York, NY 10013
Of Counsel: Mark Dwyer, Esq.
Donald J. Siewert, Esq.
Assistant District
Attorneys

KEVIN THOMAS DUFFY, D.J.:

This petition for a writ of habeas corpus is brought pro se by Raymond Mirrer pursuant to 28 U.S.C Sec. 2254 (1982). Mirrer is currently swerving concurrent sentences of a term of six months imprisonment plus four years and six months probation and a term of five years probation imposed by the Supreme Court, New York County (Altman, J.) upon conviction after trial by jury of, respectively, ten counts of offering a false instrument for filing in the first degree and one count of conspiracy in the fifth degree and violating the New York Martin Act. The Appellate Division of the New York State Supreme Court affirmed Mirrer's conviction by written opinion. People v. Firestone, 111 A.D. 2d 696, 490 N.Y.S.2d 513 (1st Dep't 1985). The New

York Court of Appeals twice denied leave to appeal this decision, once directly and once upon reconsideration.

In addition to his direct appeal, Mirrer made several motions to the trial court to vacate his conviction, has made several other appeals to the New York Appellate Division and the Court of Appeals, has moved for a writ of error coram nobis and has once before filed a petition with this court for a writ of habeas corpus. He was unsuccessful in each of these attempts.

In his prior habeas petition Mirrer alleged a number of violations of his federal constitutional rights in the state proceedings. Judge Sand reviewed the petition only after Mirrer explicitly waived his right to assert any unexhausted claims. The claims reviewed by Judge Sand

are as follows: (1) insufficiency of evidence at trial; (2) violations of Mirrer's sixth amendment rights through trial court's allowing his pro se representation for six months before trial; (3) the trial court's failure to inquire into Mirrer's trial attorney's alleged conflict of interest; (4) ineffective assistance of counsel; (5) misrepresentation of evidence by the prosecution and (6) improper denial of Mirrer's motion for severance. See Memorandum of Law for Respondent Kevin T. Smyley ("Smyley Mem."), Exh 6 at FA-6. The Second Circuit Court of Appeals affirmed Judge Sand and then denied Mirrer's motion for rehearing. Mirrer v. Inham, 833 F.2d 1003 (2d Cir. 1986). The Supreme Court denied certiorari. Mirrer v. Inham, __U.S.__, 108 S.Ct. 230 (1987).

Mirrer now brings this petition on the grounds that his constitutional rights were violated by: (1) unlawful treatment during the grand jury proceeding; (2) an indictment that charged him with crimes regarding a showing of knowledge although he had none; (3) the prosecutor misrepresentations to the jury that denied him a fair trial; (4) the inadequacy of both his trial counsel and his appellate counsel, which denied him effective assistance of unbiased counsel; and (5) the State court's continued denial of his right of appeal. Mirrer appears to have now fully exhausted his state remedies on these claims.

FACTS

Briefly stated, Mirrer was charged with participating with five others, in 1979 and 1980, in a conspiracy to sell

limited partnerships in coal-mining ventures. The sellers represented to investors that the ventures would mine large amounts of coal and that the investors would be entitled to take tax deductions several times the amount of their cash investments. Mirrer signed an opinion, in his capacity as an attorney, that represented that the promised tax deductions were valid.

DISCUSSION

Prior to addressing the merits of Mirrer's petition, I note that Mirrer's claims have previously been substantially reviewed at least twice in New York state courts, once in both this district court and the Court of Appeals for the Second Circuit, and certiorari has been denied by the United State Supreme Court. The respondent rightfully points out that

Mirrer has had his various claims reviewed by some twenty judges of both state and federal courts. Smyley Mem. at 32. Although Mirrer's claims on this petition are not identical to those raised in his earlier petition, they are sufficiently similar that this petition borders on an abuse of the writ. This is particularly relevant in light of Mirrer's waiver of any unexhausted claims prior to review of his petition by Judge Sand. See Nell v. James, 811 F. 2d 100, 104-105 (2d Cir. 1987). However, because it is within my discretion to do so, and because it may dissuade Mirrer from filing further petitions, I review the merits of his claims on this petition as follows.

Mirrer's first claim, that the state grand jury proceeding was unlawful, alleges that he was interrupted during his

presentation to the grand jury and that the prosecutor falled to recall him to testify despite the grand jury's request. However, there is no federal constitutional right to a grand jury in a state criminal proceeding. The right to a grand jury is a matter of New York State law and as such is not reviewable on a petition for habeas corpus. See Hameed v. Jones, 750 F. 2d 154, 160 (2d Cir.). cert. denied, 471 U.S. 1136 (1984).

Errors of state law are not reviewable on a habeas petition unless they "Arise for some other reason to the level of a denial of rights protected by the United States Consititution." Wainwright v. Goode, 464 U.S. 78, 86 (1983), reh'g denied, 465 U.S. 1014 (1984) (quoting Gryger v. Burke, 334 U.S. 728, 957-58 (1948)). Although the state cannot

arbitrarily deny Mirrer rights which are state created, there is no claim here of an arbitrary denial, nor do the facts support such a claim. Further, the New York State courts have twice reviewed this claim in written opinions and found it without merit. See Smyley Mem., Exh 9; People v. Firestone, 111 A.D. 2d 696, 490 N.Y.S. 2d 513 (1st Dept 1985).

Mirrer next claims that the state grand jury indictment was defective because there was insufficient evidence to support the charge. However, a conviction by a petit jury demonstrates a fortiori that there was probable cause to charge that offense. United States v. Mechanic, 475, U.S. 66,67 (1986); United States v. Midland Asphalt Corp., 840 F.2d 1040, 1046 (2d Cir. 1988). Judge Sand, in denying Mirrer's prior habeas petition, has

already determined that the conviction was supported by sufficient evidence.

Mirrer's next claim, that the prosecutor's misrepresentations of fact and law to the jury prejudiced his case and denied him a fair trial, has likewise been determined to be without merit on the prior habeas petition. In an unpublished memorandum accompanying its affirmation of Judge Sand's decision, the Court of Appeals for the Second Circuit noted that even if there had been misrepresentation, it did not cause such fundamental unfairness as would support a petition for writ of habeas corpus. Smyley Mem.,Exh.7.

Mirrer next alleges violations of his sixth amendment rights. In essence, he claims that he was denied effective assistance of both trial and appellate counsel. Mirrer asserts that he was not

adequately represented by trial counsel John Wall, and that the representation by his appellate counsel Ambrose Doskow was also inadequate because Doskow failed to attack Wall's errors and bias.

The claim that Wall inadequately represented Mirrer at trial was reviewed and resolved against Mirrer by Judge Sand in the prior habeas petition. Because it has already been determined that Wall adequately represented Mirrer, the claim against Doskow for failing to argue that Wall's representation was inadeqaute must also fail. Moreover, there is no constitutional error in an appellate coounsel's decision not to raive every nonfrivolous issue requested by defendant. Jones v. Barnes, 463 U.S. 745, 746 (1983).

Finally, Mirrer alleges a denial of his right to appeal. He claims that the

June 25, 1985, decision of the New York Appellate Division, affirming his conviction, was contrary to the facts and that by refusing to hear his appeals further, the New York courts denied him his right to appeal. Here too, Mirrer alleges an error of New York State law that is not reviewable by this court. There is no federal constitutional right to state appellate review of a state criminal conviction. Estelle v.Dorough, 420 U.S. 534,536, reh'g denied, 421 U.S. 921 (1975). Although a state cannot arbitrarily deny the right to appeal where it has provided for such a right, there is no claim here of such a denial nor does the record support such a claim.

In sum, Mirrer's claims do not present any basis for the issuance of a writ of habeas corpus. The petition is denied.

SO ORDERED.

DATED: New York, New York
January 5, 1988 (sic)

/S/
KEVIN THOMAS DUFFY, U.S.D.J.

85-Civ-6294
SDNY
Sand

LWP UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States court of Appeals for the Second Circuit, held in the United States Courthouse in the City of New York on the 25th day of November, one thousand nine hundred and eighty-six.

PRESENT:

HON. WILLIAM H. TIMBERS,

HON. ELLSWORTH A. VAN GRAAFEILAND,

HON. LAWRENCE W. PIERCE,

Circuit Judges.

- - - - - - - - - - - - - - - - - x

RAYMOND MIRRER, ORDER

Petitioner-Appellant,

86-2235

- v -

FILED NOV. 25, 1986

WILLIAM INHAM, Warden, North Facility Department of Correction,

Respondent-Appellee.

- - - - - - - - - - - - - - - - - x

Appeal from an order denying appellant's petition for habeas corpus pursuant to 28 U.S.C. Sec. 2254 (1982 in the United States District Court for the Southern District of New York (Sand, J.).

1. Appellant was convicted after a jury trial in New York on charges of securities and tax fraud. On appeal, appellant alleges that he was denied a fair trial due to the ineffective assistance of cdounsel, contending that

counsel was inadequately prepared for trial and delivered a summation evidencing a conflict of interest. We do not agree. To support his claim that counsel was not adequately prepared for trial, appellant notes that counsel was not adequately prepared for trial, appellant notes that counsel waived opening argument, had only ten days to prepare for trial, and was not admitted to practice in New York. A claim of ineffective assistance of counsel, however, will prevail only if an attorney's performance is so deficient that it created "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Strickland v. Washington, 466 U.S. 668,695 (1984). We do not think that the evidence appellant has offered meets the Strickland standard.

Appellant's contention that his counsel, Wall, was burdened by a conflict of interest also must fail. To establish an effective assistance of counsel claim, "a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Strickland, 466 U.S. at 692 (quoting Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Here, appellant had agreed to an arrangement in which he had hired Wall but Wall was paid by his co-defendants. Appellant could have been represented by a court-appointed lawyer but rather chose to hire Wall. Moreover, in his summation, Wall clearly articulated that he was appellant's attorney and emphasized appellant's innocence.

2. Appellant also alleges that the prosecutor's argument to the jury

misrepresented the amount of time that appellant had reviewed a tax opinion. A prosecutor's misrepresentation of the evidence warrants habeas corpus relief only when it renders the trial so fundamentally unfair that it results in a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1979). In his summation, the prosecutor inferred that appellant decided to sign a tax opinion. We agree with the district court that the prosecutor's proposition could have been inferred from the evidence. However, even if the prosecutor did misrepresent the amount of time appellant considered the tax opinion, such a misrepresentation would not render the trial fundamentally unfair. The prosecutor's comments regarding appellant's consideration of the tax

opinion consisted of one paragraph in two hundred transcript pages of summation. Further, there was ample other evidence in the record to support the appellant's conviction.

3. Appellant claimed that there was insufficient evidence of the mental elements of the crimes charged to support a conviction. However, according to Jackson v. Virginia, 443 U.S. 307, 319 (1979), a habeas claim will succeed only if no rational trier of fact could have found proof beyond a reasonable doubt. Here, there was sufficient evidence of appellant's bad faith, because, among other things, the prosecutor presented evidence that appellant misrepresented his expertise in the tax and securities area and provided misleading statements to investors.

We have considered appellant's other arguments and find them to be without merit.

We affirm the judgment of the district court.

/S/_____
HON. WILLIAM H. TIMBERS,

/S/_____
HON. ELLSWORTH A. VAN GRAAFEILAND,

/S/_____
HON. LAWRENCE W. PIERCE,

Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and it is not uniformly available to all parties, it shall not be reported cited or otherwise used in unrelated cases before this or any other court.

MISCELLANEOUS
CERTIFICATE

NO. 2049

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK	on INDICTMENT for Grand Larceny in the 2nd Deg. Scheme to Defraud in the 1st Deg., Offering a False Instrument for Filing in the 1st Deg., Conspiracy in the 5th Deg., Violation of General Business Law Section 352-C
against	
RAYMOND MIRRER	No. 116-82
	Filed Jan. 18, 1982

I, NORMAN GOODMAN, County Clerk and Clerk of the Supreme Court, New York County, do certify that it appears from an examination of the Records on file in this

office, that On April 19, 1983 the above named defendant was tried and found guilty of the crimes of Conspiracy in the Fifth Degree (Count 1 of the Indictment) Violation of Section 352-C of the General Business Law (Count 2) and Offering a False Instrument for Filing in the First Degree (Counts 4-13).

That on June 10, 1983 before the Honorable Benjamin Altman, a Justice of the Supreme Court, the defendant was sentenced on Count 1 to Probation for Three Years, for Count 2 to Probation for Three Years and on Counts 4 to 14 to a definite term of imprisonment for Six Months and Probation for Four Years and Six Months.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official Seal this 17th day of January 1986.

/S/ Norman Goodman

County Clerk and Clerk
of the Supreme Court,
New York County